

30 November 2012
2nd Annual Report to
Employee Misclassification Advisory Task Force
Research & Resources Committee

Committee Members: Dr. William Canak (chair), Carolyn Lazenby, Shara Hamlett, Bill Mason, Jenny Taylor, Nathan Burton, Matthew Capece, John Finch, Michael Norse, Danny Odom, Susan Ritter and Bill Young.

The Research & Resources Committee (RRC) addresses the following issues in its second annual report. These topics originate in Tenn. Code Ann. 50-6-919 (2011) and extend the review of issues 1 to 7 addressed in the Task Force's First Annual Report (2012)

8. New strategies for systematically investigating the failure of employers to properly classify individuals as employees
9. Whether improvements are needed to facilitate the filing of complaints and identify potential violators, including, but not limited to, soliciting referrals and other relevant information from the public
10. Changes in the laws, if any, that need to be made in order to ensure that agencies represented by task force members investigating the failure of employers to properly classify individuals as employees under their own statutory or administrative enforcement mechanism have the authority to refer a matter to other participating agencies for assessment of potential liability under the other agencies' relevant statutory or administrative enforcement mechanisms
11. Innovative ways to prevent misclassification of employees by employers, such as through disseminating educational materials regarding the legal differences between independent contractors and employees
12. Methods by which public awareness of the illegal nature and harms inflicted by the failure of employers to properly classify individuals as employees can be increased
13. Any other issues relative to employee misclassification in the construction industry

The RRC's contribution to the Task Force's mission primarily reviews the following domains: objective academic research, legislation, task forces, and enforcement. This RRC report provides a brief summary of information derived from research in each domain and is complemented by detailed appendices.

Appendices

- A: State Legislation 2010 & Earlier
- B: State Legislation 2011 & 2012
- C: Survey of Research on Employee Misclassification
- D: State Enforcement Initiatives
- E: State Task Forces & Outcomes

Tenn. Code Ann. 50-6-919 (2011): Task Force Issues

Issue 8:

Numerous states (Appendices A, B & C) have utilized academic researchers with established objective professional reputations as a means to develop comprehensive descriptions of Employee Misclassification & Underreporting and estimates of the impact these practices have on state revenues for unemployment insurance, workers' compensation premiums and taxes. Using multiple empirical research methods, these

studies provide, in sum, a rich comparative body of objective data on the extent of misclassification.

States implementing multi-agency fraud detection data sharing and data mining methods, such as Washington and Louisiana, have demonstrated the utility of these strategies for identifying the extent of employer misclassification, but also confirmed the practicality of these methods for identifying individual employers and broader networks of systematic illegal activity linked to payroll fraud (Appendix D & E). Current investigations remain hampered by lack of access to information reported to the National Council on Compensation Insurance (NCCI) regarding details of coverage for specific employers.

Recommendations: The RRC recommends adoption of integrated data management and sharing between Tennessee Agencies and external sources in order to assist investigation and enforcement. The RRC recommends funding of continued research by objective academic researchers to determine the extent of misclassification and under reporting of employees throughout the Tennessee economy. The RRC recommends that Tennessee provide certified training on both civil and criminal investigative techniques to ensure that state agency investigators perform thorough and complete investigations that meet industry recognized standards.

Issue 9:

States making substantial improvements to complaint filing procedures have experienced marked improvements in identifying employers who practice misclassification (Appendices A & B). Incorporation of economic incentives and aggressive use of multiple modes of reporting, including social media and internet domains, facilitates existing agency based resources for identifying misclassification practices. Improved communication with local government officials, particularly with regard to the range of negatives community consequences, including costs, presents a significant opportunity for inter-governmental cooperation and collaboration. Local knowledge of construction activity and incentives to local officials can provide a more extensive use of trained and experienced local officials at low cost and higher reliability than other sources of information.

Recommendation: The RRC recommends investment in communication and education strategies that enhance the incentives and opportunities for the general public to be aware of these misclassification practices and report them to the appropriate state agencies. Incentives for reporting should be matched with guarantees of protection and immunity, particularly given that misclassified employees may have an undocumented work status that presents disincentives to reporting.

Issue 10:

Thirty-four states have adopted pro-law enforcement measures to address payroll fraud, including stop work orders, penalties for failure to classify employees, administrative penalties for workers' compensation premium avoidance, funding for special

prosecutors, and penalties for money service businesses linked to payroll fraud. (Appendix D & E).

At present, Tennessee's lack of administrative monetary penalties makes curbing employee misclassification difficult. Current Tennessee law does not authorize the TDLWD to assess administrative monetary penalties against employers for workers' compensation premium avoidance (See 2012 Annual Task Force Report). Current Tennessee law does not authorize TDLWCD to issue stop work orders to offending employers (See 2012 Annual Task Force Report).

Recommendation: The RRC recommends that Tennessee pass legislation modeling those states, in particular states in the South East such as Florida and Louisiana, that have made significant progress in identifying misclassification, reducing payroll fraud, and increasing state revenues previously lost due to fraud. The RRC recommends extension of the current Task Force's mandate to address issues related to employee misclassification in industries other than construction.

Issue 11:

The RRC cedes to the Task Force any initiative on this Issue given that other committees and the Task Force leadership has solicited proposals and reviewed a variety of alternative technologies and methods for using system software and multi-agency intergovernmental coordination to address innovations.

Issue 12:

The RRC recognizes Task Force initiatives, including a website and fraud tip line and tip form that became operational in 2012, as important steps addressing this issue.

Social Media networks present a low cost high impact opportunity for Tennessee to incorporate developing non-traditional media for communicating laws and regulations relevant to misclassification practices. These social networking media have high currency with target populations most likely to be aware of employers engaging in payroll fraud. Face Book presents one opportunity. Twitter offers another low cost information medium with high potential to inform widely dispersed construction employees and employers.

Recommendations:

RRC recommends that the Task Force study social media as a methodology for increasing public awareness of misclassification's illegal and harmful economic and social impact on Tennessee.

The RRC recommends that Tennessee add a test question to the contractor's licensing exam and that this be an item on the licensing applications. The substance of the question and application item would focus on awareness of the employee definition - Mark "yes" or "no." This format would be consistent with other questions on the Licensing Board applications.

The RRC recommends that there be a fact sheet for the “employee and/or anyone hired” similar to the employment package with the W2 form. This would parallel current TOSHA postings Requirements and present a minimal cost since the forms may be duplicated using current photocopy technology.

Issue 13:

Columbia University Law School National State Attorneys General Program is collecting resource materials from investigators and prosecutors familiar with payroll fraud cases. They are planning to assist law enforcement by providing access to those materials on a dedicated web site.

A significant aspect of employee misclassification originates with unfair construction contractors from other states, like Georgia for instance, who work in Tennessee and violate Tennessee law.

Recommendations:

The RRC recommends that the resource web site should be accessed for education purposes by Tennessee officials. Also, as permitted by law, Tennessee law enforcement personnel should provide appropriate materials to the web site to assist their colleagues in other states as well.

The RRC recommends that task force members establish routine lines of communications with their counterparts in other states to facilitate information sharing and law enforcement coordination.

State Legislation and Executive Orders Regarding Misclassification/Payroll Fraud

Updated November 1, 2010

State Legislation or Executive Order	Year Became Law	Description
California <u>Unemp Ins. Code Sec. 329</u>	1995	Statute creates a joint enforcement task force on the underground economy composed of various state agencies .
<u>SB 869 An Act Relating to Enforcing the Requirement to Carry Workers' Compensation</u>	2007	Compares companies registered with unemployment and workers compensation records to identify employers without compensation coverage. Penalties from investigations reinvested in administration and enforcement
<u>SB 313 An act amending Labor Code Section 3722 increasing penalties for no workers compensation</u>	2009	This legislation applies to all industries. It increases the penalty for not having workers' compensation coverage from a minimum of \$1,000 per employee to \$1,500 per employee.
Colorado <u>HB 1366 An Act Concerning Workers' Compensation Coverage for Workers in the Construction Industry</u>	2007	Requires all construction workers, including independent contractors, to have compensation coverage, unless the independent contractor is incorporated or an LLC or the work is being done by an owner/occupant of a residence. Penalty revenues go to enforcement
<u>HB 1310 An act concerning the misclassification of employees as independent contractors for purposes of the Colorado Employment Security Act</u>	2009	Punishes misclassification of employees as independent contractors in all industries. Employment is presumed as in the state unemployment code. Non-willful violators must pay back taxes and interest. Willful violators face fines per employee that increase for a subsequent violation.
Connecticut <u>Sec. 52-57e Action for Damages From Violations of Workers Compensation or Unemployment Compensation Laws</u>	1990	The law provides a cause of action for companies that lose a bid due to their competitor violating knowingly workers compensation or unemployment compensation laws. Employment status is determined by the Internal Revenue Code.
<u>PA 7-89 An Act Concerning Penalties for Concealing Employment or Other Information Related to Workers' Compensation Premiums</u>	2007	Establishes stop work orders against employers for workers' compensation premium fraud due to misclassification or for not having compensation insurance. Makes not having compensation a felony. (Premium fraud had already been a felony.)

State Legislation or Executive Order	Year Became Law	Description
Connecticut cont. <u>PA 8-156 An Act Establishing a Joint Enforcement Commission on Employee Misclassification</u>	2008	An enforcement task force on misclassification for all industries is established that includes the labor commissioner, chair of the workers compensation commission, attorney general and the chief state's attorney. The law also creates an advisory board of employee and employer representatives.
<u>PA 10-12 An act to increase penalties for non compliance with workers' compensation</u>	2010	The civil penalties for non-compliance with workers' compensation coverage requirements is raised to \$300 per day. The Act clarifies that an injury to the state from workers' compensation fraud can be the basis of a criminal charge.
Delaware <u>SS 1 for SB 68 An Act to Amend Workers' Compensation Code</u>	2007	The law provides that independent contractors cannot be exempt from workers' compensation coverage.
<u>HB 230 Workplace Fraud Act</u>	2009	Prohibits the failure to properly classify an individual as an employee in the construction industry. The Act creates a presumption of employment. Punishment includes fines per employee which increase for willful and repeat violators, stop work orders, debarment and withholding of payments on public works projects. Co-conspirators are fined as well as the use of shell corporations. The Act allows private suits, and requires notice to workers classified as independent contractors in English and Spanish. Civil penalty money to be used for enforcing the Act.
Florida <u>Sec. 440-140 Competitive Bidders Civil Actions</u>	1993	The statute allows a bidder on a construction project that loses a bid due to its competitor violating workers compensation laws to bring suit for liquidated damages and attorney fees.
<u>S 50A Workers' Compensation Reform and Additional Penalties</u>	2003	The law contains numerous revisions to workers compensation including: limiting exemptions to workers compensation coverage and extending coverage to independent contractors in the construction industry; increasing criminal penalties for employers committing premium fraud and who violate stop work orders. Civil penalties for violating stop work order are increased. An employer's second violation is a deemed a "knowing violation." Employers are fined \$5,000 for each employee misclassified as an independent contractor, and stop work orders are allowed for premium fraud as well as failure to secure coverage.
<u>HB 561, Section 10 Forfeiture</u>	2006	Forfeiture assets must be put in a fund for the operations of the Insurance Fraud Division.

State Legislation or Executive Order	Year Became Law	Description
Florida (cont.) <u>S 2158 An Act Tightening Regulation of Check Cashing Businesses</u>	2008	The law contains numerous provisions designed to crack down on use of check cashing stores in money laundering schemes. Check cashing stores have proven to play a central role in hiding unreported cash transactions to escape employment tax and workers compensation coverage laws.
Hawaii <u>SB2220, CD 1 An act to create a task force to study enforcement against the underground economy</u>	2010	The law creates a task force focusing to study enforcement tactics, laws, ways to deter tax and other violations, data systems and information sharing to combat unlicensed contractors, hiring of undocumented workers and workplace safety violations in the construction industry. Its report will be used to implement an enforcement task force.
Illinois <u>PA 95-0026 Employee Classification Act</u>	2007	The Act punishes the failure to properly classify a worker as an employee in the construction industry. A presumption of employment is created. It allows private suits. Provides for agency and private enforcement. Violations can result in restitution to the worker, criminal penalties, civil penalties per worker and debarment. Punishments increase for willful violations.
Indiana <u>SB 478 An act concerning cooperation among agencies on misclassification cases</u>	2009	This Act applies to the construction industry. It requires the departments of labor, workforce development, revenue and the workers' compensation board to on misclassification cases by sharing information.
<u>SB 23 An act concerning unemployment taxes and misclassification in the construction industry</u>	2010	The Act authorizes the department of labor to "develop guidelines and procedures for investigating questions and complaints concerning employee classification," sharing of information between agencies and an implementation plan. The IRS code is used to define employment. Some small contractors are exempted. The guidelines are to be presented to a legislative committee and finalized before August 1, 2011.
Iowa <u>Exec. Order 8 Independent Contractor Reform Task Force</u>	2008	The executive order creates a task force made of representatives from the governor's office, workforce development, revenue, economic development and the labor commissioner to study misclassification and make recommendations.
<u>HA 1785 Budget funding of investigations</u>	2009	The state budget provides up to \$750,000 for the fiscal year to "enhance efforts to investigate employers that misclassify workers.
Kansas <u>Sec. 44-766 Employer Misclassification of Employees</u>	2006	Employers are prohibited from intentionally misclassifying employees as independent contractors in order to avoid requirements under state income tax and unemployment tax laws. The statute allows revenue to disclose tax-return information to the dept. of labor.

State Legislation or Executive Order	Year Became Law	Description
Louisiana <u>HB 554 An Act Relative to Discontinuance of Business Operations and Penalties for Failure to Carry Workers Compensation Insurance</u>	2008	Amends current law by requiring courts to order a non-compliant employer to secure workers compensation insurance and pay a fine up to \$10,000 within ninety days. If the employer fails to do either, the court will issue an order to the employer to cease business operations until the employer has insurance and has paid its fines in full.
<u>HB 873 Act 288 An Act Increasing Fines for Failure to Have Compensation Coverage</u>	2010	The Act increases criminal and civil penalties for employers who fail to secure workers' compensation. Penalty revenue goes to a workers' compensation administration fund.
Maine <u>EO 23 FY08/09 An order establishing the joint enforcement task force on employee misclassification</u>	2009	The executive order creates an enforcement task force for misclassification cases in all industries. The task force includes: DOL agencies, workers comp. board, attorney general, administrative & financial services, revenue, professional & financial regulation and insurance.
<u>LD 1456 An act to ensure construction workers are protected by workers' compensation insurance</u>	2009	General contractors or construction managers on state college work must disclose to the contracting agency the names of all subcontractors and independent contractors. A construction worker is presumed to be an employee and must be covered by workers' compensation, unless the worker satisfies a definition of independent contractor or hauls materials in a vehicle weighing more than 7,000 pounds.
<u>LD 1565 An act concerning stop work orders in the construction industry</u>	2010	This statute authorizes the Executive Director of the Workers' Compensation Board to issue a stop-work order after an administrative hearing to construction contractors who repeatedly fail to comply with workers' compensation coverage requirements.
<u>LD1815 An Act to clarify construction subcontractor status</u>	2010	Construction employers, employees or workers' compensation carriers can get a pre-determination whether a worker is an employee or independent contractor.
Maryland <u>HB 819/SB 909 Workplace Fraud Act</u>	2009	The statute prohibits the failure to properly classify an individual as an employee in the construction and landscaping industries. The Act creates a presumption of employment. Punishment includes fines per employee which increase for willful and repeat violators. Co-conspirators are fined as well as the use of shell corporations. The Act allows private suits, and requires notice to workers classified as independent contractors in English and Spanish.
<u>EO 01.01.2009.09 The Joint Enforcement Task Force on Workplace Fraud</u>	2009	The executive order creates an enforcement task force to investigate misclassification in all industries. The task force is comprised of the representatives of the following departments:

State Legislation or Executive Order	Year Became Law	Description
Maryland (cont.) <u>EO 01.01.2009.09 The Joint Enforcement Task Force on Workplace Fraud (cont.)</u>	2009	labor, unemployment tax, workers compensation, the attorney general, comptroller, insurance and any other government agency that they want to add.
Massachusetts <u>GL 149 Sec. 148B Fair Competition for Bidders on Construction</u>	2004	The law prohibits the failure to properly classify an individual as an employee in the construction industry. It creates a presumption of employment and includes standards for independent contractor status. Violators face civil or criminal penalties and debarment.
<u>S 1059 An Act to Clarify the Law Protecting Employee Compensation</u>	2008	The law provides for private and class action suits regarding prevailing rate, overtime and minimum wage violations. Recovery includes treble damages, costs and attorney fees.
<u>Exec. Order 499 Establishing a Joint Enforcement Task Force on the Underground Economy and Employee Misclassification</u>	2008	The executive order creates an enforcement task force to investigate misclassification in all industries. It includes representatives from the labor department, revenue, industrial accidents, attorney general, occupational safety, public safety, licensing, apprenticeship and unemployment tax.
Michigan <u>Exec. Order 2008-1 Interagency Task Force on Employee Misclassification</u>	2008	An executive order creating and enforcement task force to investigate misclassification in all industries. The task force is made of representative from the department of labor, workers compensation, unemployment, tax enforcement and business services.
Minnesota <u>Sec. 181.722 Misrepresentation of Employment Relationship Prohibited</u>	2005	Employers are prohibited from misrepresenting an employment relationship or from failing to report individuals as employees. Agreements to misclassify an employee as an independent contractor are prohibited. Employment is determined by unemployment and workers' compensation laws. A construction worker can bring a suit for damages against an employer who violates the law. A court finding a violation of the law must report it to the labor commissioner. The labor commissioner shall report to other state and federal agencies.
<u>Chapt. 135, HF 122, Sec. 15 Defining Independent Contractor Status and Requiring Certification</u>	2007	This law creates a presumption of employment for workers compensation, unemployment and other labor laws in the construction industry. To be considered an independent contractor a worker must hold a certificate from the department of labor. Certificates can be cancelled by the individual or revoked by the state if the individual no longer meets the independent-contractor criteria. The depart. of revenue has to be notified of violations.
<u>Chapter 154 HF 3201 Article 3 Income Taxes, Sec. 8 and 9</u>	2008	The law requires a 2 percent withholding of state income taxes from compensation paid to unincorporated independent contractors in the construction industry.

State Legislation or Executive Order	Year Became Law	Description
Minnesota (cont.) <u>SF 1476 Sec. 11 Workers' compensation re- form bill section regarding data sharing be- tween agencies</u>	2009	The section expands the information that can be shared between enforcement agencies and the workers compensation commissioner to determine employment status and compli- ance with workers' compensation laws. The law also allows the commissioner to request information pursuant to state agency agreements.
<u>HF 2088 Provisions for funding of investigators and creation of a task force</u>	2009	The state budget provides for two years worth of funding for additional personnel to en- force the independent contractor certificate program. It also creates a misclassification ad- visory task force for the construction industry. The task force is composed of representa- tives of labor, employment and economic development, revenue, attorney general, county prosecuting attorneys, construction unions, construction employers, employees and inde- pendent contractors. A report is required to the legislation before its term expires.
Missouri <u>HB 1549T Addressing Immigration and Mis- classification</u>	2008	Misclassification provisions were added to this immigration bill. It requires every em- ployer in the state with 5 or more employees to file 1099 forms with the state for its inde- pendent contractors. Failure to repeatedly and knowingly file the forms results in misde- meanor charges and fines. Employment is defined by the IRS twenty factor test. Violations can result in an injunction and fines per worker.
Montana <u>Secs. 39-71-415 to 419 Independent Contractor Certification for Workers Compensation</u>	2005	To be free of the requirement to cover with workers compensation, a person must fall into an exempt category or be a certified independent contractor. Certifications can be revoked if the degree of direction and control creates employment status or if there was a misrepre- sentation in the application.
<u>HB 65 § 1 An Act Generally Revising Work- ers' Compensation Law</u>	2007	Section 1 of the Act gives workers compensation investigators access to construction sites to investigate compliance with coverage requirements.
Nebraska <u>LB 208 An act relating to workers compensa- tion premium fraud</u>	2009	This new law makes workers compensation premium fraud a fraudulent insurance act.
<u>LB 563 Employee Classification Act</u>	2010	Misclassification of employees is prohibited in the construction and delivery industries. It creates a presumption of employment. Violators face civil penalties per misclassified em- ployee. Those penalties increase for subsequent offenses. Also, information on violations is shared with other departments, and violators must pay all state taxes owed. Posting of a notice about the Act is required.

State Legislation or Executive Order	Year Became Law	Description
Nevada <u>SCR 26 Senate Concurrent Resolution providing for an interim study on employee misclassification</u>	2009	The resolution forms a legislative subcommittee that a member of the public, a non-union contractor and a union construction representative. They are charged with studying and reporting on the scope of misclassification, and finding a processes to identify misclassification and legal recourses for affected employees.
New Hampshire <u>SB 92 An Act Relative to the Definition of Employee and Clarifying the Criteria for Exempting Workers from Employee Status</u>	2007	The law creates a uniform definition of employment for workers compensation, workplace protections, whistleblower and minimum wage laws. Penalties are deposited into a dedicated enforcement fund.
<u>HB 336 An Act Requiring Notice of the Classification of Employee and Independent Contractor</u>	2007	Requires employers to post information about criteria for classifying workers as employees and independent contractors.
<u>HB 337 An Act Relative to Penalties for Failure to Have Workers' Compensation and Continually Appropriating a Special Fund</u>	2007	The Act increases civil penalties for failure to secure compensation coverage, and persons with responsibility to disburse funds or salaries are held personally liable. The penalties are deposited into a designated enforcement fund.
<u>HB 426 An Act relative to workers' compensation and resolution of disputes involving employment status</u>	2007	The insurance commissioner can investigate and hold hearings to resolve disputes between employers and their workers' compensation carriers about whether workers are employees or independent contractors.
<u>HB 471 An Act Relative to Workers' Compensation Compliance in the Construction Sector and Continually Appropriating a Special Fund</u>	2007	Officers, directors or LLC members of a construction company who do on-site construction work cannot be excluded from compensation coverage. Requires all contractors, subcontractors and independent contractors on state projects to provide proof of workers' compensation coverage. The number of employees or independent contractors and their compensation classification codes on such projects also must be disclosed. Violations can result in civil penalties and debarment. Civil penalties go to a workers' compensation enforcement fund.
<u>HB 692 An Act Relative to Workers Compensation</u>	2008	The legislation amends HB 471 passed in 2007. HB 692 re-establishes exemptions from workers compensation coverage for up to three officers of a corporation or members of a limited liability company.
<u>SB 500 An Act Relative to Certain Insurance Fraud and Establishing a Task Force on Employee Misclassification</u>	2008	The Act increases the penalty for the failure to carry workers' compensation to a class B felony. It requires insurers to have written or electronic signatures on insurance, including workers' compensation, applications. A person convicted of insurance fraud will be debarred from public works projects ordered to pay restitution to the insurance carrier. A

State Legislation or Executive Order	Year Became Law	Description
New Hampshire (cont.)		misclassification study task force is established that includes the labor commissioner, un-employment, insurance, revenue, attorney general, labor unions, construction contractors, other business owners and insurance carriers.
<u>SB 78 An act regarding contractor accountability and disclosure in public works construction procurement</u>	2009	General contractors on state college work must disclose to the contracting agency the names of all subcontractors and independent contractors. The disclosure must include workers compensation carriers, be posted on the project and must be updated.
<u>HB 1368 An act regarding the definition of “employee” for workers’ compensation</u>	2010	The Act clarifies that a written agreement containing certain language will rebut the presumption of employment. It creates a fines misclassification for misclassification of up to \$2,500 for the violation and \$100 per employee for each day of non-compliance.
<u>EO 2010-3 An order establishing a joint agency task force on employee misclassification enforcement</u>	2010	The order directs enforcement agencies to pool, focus and coordinate their resources to investigate and enforce cases of employee misclassification. The department of labor is the lead agency. A yearly report is required.
New Jersey		
<u>S 468 Withholding Taxes From Payments to Unincorporated Contractors</u>	2006	Payments made to unincorporated contractor for improvements made to real property are subject to a 7 percent withholding. The requirement does not apply to a governmental entity, homeowner, tenant, or if a person receives from its unincorporated contractor proof of its registration with the division of revenue.
<u>C:34:20-1 et. seq. An Act Concerning the Classification of Construction Employees for Certain Purposes and Supplementing Title 34 of the Revised Statutes</u>	2007	The Act makes unlawful the failure to properly classify a worker as an employee in the construction industry. For construction work it creates a universal presumption of employment and a uniform definition under state law—with the exception of the workers compensation. Knowing violations result in criminal penalties. Other penalties include debarment, restitution, suspension of contractor registration, stop-work orders and fines. Fines go to an enforcement and administrative fund. The Act allows private-causes of action for workers.
<u>Exec. Order No 96 Governors Advisory Commission on Construction Industry Independent Contractor Reform</u>	2008	The order establishes an advisory commission of representatives from labor & workforce development, the attorney general, treasurer and eight public representatives from labor unions, developers and contractors. The purpose is to create make recommendations to enhance law enforcement and cooperation between state and federal agencies.
<u>A 3569, S 2498 An act concerning certain violations of workers’ compensation requirements</u>	2009	An employer that fails to provide workers’ compensation coverage, misrepresents workers as independent contractors otherwise commits premium fraud face stop work orders and criminal penalties that increase if the violation is willful.

State Legislation or Executive Order	Year Became Law	Description
New Mexico <u>SB 657 Employer, Employee Relationship in the Construction Industry and Independent Contractors</u>	2005	The law creates a presumption of employment in the construction industry and standards for independent contractor status. An employer violates the law if it intentionally treats or lists an employee as an independent contractor. Employers who violate the law face criminal penalties, suspension or revocation of licenses.
New York <u>Exec. Order 17 Misclassification Task Force</u>	2007	The order forms an enforcement task force of all industries made of representatives from the labor department, attorney general, taxation and finance, workers compensation board, workers compensation fraud and New York City comptroller.
<u>A 6163 An Act to Amend the Workers' Compensation Law, §§52D, 141A</u>	2007	Establishes stop work orders, debarment and criminal penalties for employers who don't have workers' compensation or who commit premium fraud.
<u>S 5847F Construction fair play act</u>	2010	Law creates a uniform presumption of employment for construction workers under the workers' compensation and unemployment insurance codes using the ABC test. Misclassification and unreported compensation are prohibited. Agencies that find violations, including tax, must inform others. There are civil penalties for non-willful and willful violations. Civil penalties increase for willful and repeated violations, and criminal penalties are added. Debarment is also a penalty. Penalties extend to substantially owned affiliates.
Ohio <u>Sec. 5703.21 and 5747.18 as amended allowing more sharing tax information between agencies</u>	2009	The amendments allow the department of taxation to share taxpayer information with other state agencies to assist their investigations.
Oregon <u>HB 3242 An act relating to construction contractors, licensing and workers' compensation coverage</u>	2007	Requires licensed commercial contractors to have workers' compensation coverage.
<u>HB 2815 A bill for an act relating to compliance with laws-creating an enforcement task force</u>	2009	The bill establishes and enforcement task force of all industries composed of: the departments of justice, revenue, employment, consumer and business services, labor and industries, the governor, the construction contractor board, and other agencies the governor designates.
Pennsylvania <u>HB 400 An Act providing for the criteria for independent contractors in the construction industry and imposing penalties</u>	2010	Construction employers who do not properly classify individuals as employees face fines calculated per worker and potential criminal penalties and stop work orders. A six part test is applied to determine independent contractor status in the unemployment and workers' compensation codes. Other parties face the same penalties if they contract with a business knowing that they will violated the Act.

State Legislation or Executive Order	Year Became Law	Description
Rhode Island <u>S 3099/H 7907B Creating a special joint commission to study the underground economy and employee misclassification</u>	2008	The Act creates a study commission composed of legislators, industry representatives and the department of labor, workers' compensation, workers' compensation advisory board, business regulation and taxation. The purpose is to study the underground economy issue findings and recommendations to the General Assembly.
South Carolina <u>SB 332 An Act Reforming Workers Compensation, Sections 3, 4, 5</u>	2007	The law clarifies that a false statement or misrepresentation to gain a lower insurance premiums includes misclassification of employees. Penalties for workers compensation fraud increase with amount of money involved. The Attorney General can hire a forensic accountant.
Tennessee <u>SB 1784 An Act Regarding Contractor Licensing</u>	2007	Any applicant for a license or renewal of a license must supply an affidavit that the applicant maintains general liability and workers' compensation insurance coverage.
<u>HB 1645 An Act Relative to Requiring Workers Compensation Coverage for Sole Proprietors</u>	2008	Workers' compensation coverage in the construction industry is required for sole proprietors and independent contractors. Contractors using independent subcontractors would have to cover them with workers compensation insurance. Some exemptions exist for work done for home owners.
<u>HB 3163/SB 3591 An act creating exemptions from workers' compensation coverage and a misclassification advisory task force</u>	2010	This legislation amends the 2008 law that extended workers' compensation coverage to most non-employees in the construction industry by creating additional exemptions for sole proprietors and company officers or owners. Exemptions are limited to three per business or affiliated businesses. Additional funds for law enforcement come from exemption-filing fees. A construction misclassification advisory task force is created to study the issue and put into place regulations and make other recommendations to improve law enforcement.
Utah <u>SB 189 Independent Contractor Database Act</u>	2008	The law creates an independent contractor enforcement council. The council is made of representatives from departments of commerce, labor, workforce services and technology services. The purpose is to create a database that will track independent contractors and compare information between agencies. Also, to study cost of misclassification, and to coordinate enforcement efforts.
Vermont <u>S 196 An Act Relating to Failure to Insure for Workers' Compensation Coverage by Employers and Contractors</u>	2007	The Act gives the state the authority to require a contractor (other than residential), to submit a "compliance statement" with the number of employees, hours, classification codes and the name of the insurance carrier and agent. Failure to comply or filing false information results in fines and other penalties. Also the state will study establishing a proof-of-coverage website, the extent of misclassification and its cost and the effectiveness of state laws to counter misclassification.

State Legislation or Executive Order	Year Became Law	Description
Vermont (cont.) <u>S 345 An Act Related to Lowering the Cost of Workers' Compensation Insurance</u>	2008	The law adds workers compensation fraud into the insurance fraud chapter and creates a joint enforcement task force that expires in 2010.
<u>H 313 Vermont Recovery and Reinvestment Act of 2009</u>	2009	In addition to many other things, this Act addresses employment law enforcement. State transportation agencies are required to establish contract procedures to minimize misclassification of employment codes and employees as independent contractors by requiring contractors disclose information, such as, past compliance issues and lists subcontractors and workers. This information can be shared with other state agencies. Agencies are required to debar contractors that violate classification requirements. Employers committing premium fraud face fines up to \$20,000. The department of labor is required to refer violations to other agencies. An employer, subcontractor or independent contractor can be required to provide a compliance statement, that includes such information as the number of employees, dates of workers compensation policies, hours worked and lists of independent contractors. Also, as an attachment, the insurance policy declaration pages are required. Failing to provide accurate information results in fines up to \$5,000 per week.
<u>H 647 An act relating to misclassification of employees to lower premiums for workers' compensation and unemployment compensation</u>	2010	This Act mandates the hiring of additional workers' compensation fraud investigators, and raises the tax on premiums to pay for it. Employer and employee workers' compensation fraud is made a crime. In addition to criminal penalties, employers without coverage face stop work orders, debarment and other civil penalties. Penalties apply to successor businesses. Fines for failing to pay unemployment taxes are also increased, and employers face debarment. Failure to properly classify a worker as an employee is punished under the unemployment-compensation code with fines of up to \$5,000 per workers and possible debarment. Penalty revenue goes into an administrative fund. The department of labor has to put into place an on-line system for reporting misclassification, and a misclassification enforcement task force is created. The task force has to report to the legislature.
Washington <u>HB 2010 An Act Relating to Bidder Responsibility</u>	2007	The Act states that bidders and bidders' subcontractors on public works contracts must comply with registration, tax and workers compensation laws. It also gives municipalities the power to adopt criteria to judge bidder responsibility.
<u>SB 5373 An Act relating to unemployment coverage and obligations</u>	2007	Sec. 4 defines who a bona fide officer is for exemption from unemployment. Sec. 8, et. seq. settles co-employment coverage for professional employer organizations and client employers and establishes reporting and registration requirements.

State Legislation or Executive Order	Year Became Law	Description
<p>Washington (cont.) <u>SB 5926 An Act Relating to Creating a Joint Legislative Task Force to Review the Underground Economy in the Construction Industry</u></p> <p><u>HB 3122 An Act Relating to Consolidating, Aligning, and Clarifying Exception Tests for Determination of Independent Contractor Status</u></p> <p><u>HB 1555/ SB 5614 Addressing the recommendations of the joint legislative task force on the underground economy in the construction industry</u></p> <p><u>HB 1554/ SB 5613 An act authorizing the department of labor and industries to issue stop work orders</u></p> <p><u>Sub SB 5904/HB 1786 An act defining independent contractor for purposes of prevailing wage</u></p>	<p>2007</p> <p>2008</p> <p>2009</p> <p>2009</p> <p>2009</p>	<p>A study task force of the underground economy in construction is created to formulate a state policy to address it. Members include legislators, contractor and employee representatives and representatives from the department of labor and industries.</p> <p>This law applies a uniform definition of independent contractor in the unemployment and workers compensation codes. It also applies other recommendations of the underground economy task force.</p> <p>This bill addresses recommendations made by the underground economy task force. Among other items it requires contractors to have a list of subcontractors and their registrations available for the department of labor and industries (L&I). Towns and county may verify registration by a contractor seeking a business license. Retainage can be kept by a public body to pay unemployment taxes and workers' compensation premiums. The law also creates a task force to conduct a continuing study of the underground economy in all industries. L&I and employment security are required to report each year to the legislature on the effectiveness of laws passed to address the underground economy.</p> <p>The department of labor and industries is given the power to issue stop work orders against construction contractors for failing to carry workers' compensation.</p> <p>The bill creates a presumption that an individual is a laborer, worker or mechanic under the state's prevailing rate law with a modified/extended version of the ABC test.</p>
<p>Wisconsin <u>Act 28, Secs. 1778q and 2155m Budget act regarding misclassification and contractor registration</u></p>	<p>2009</p>	<p>In Sec. 1778q, the state's withholding tax law is amended to provide that a construction employer that willfully provides false information to the department of revenue or misclassifies or tries to misclassify a worker as a non-employee is fined \$25,000 for each violation. Section 2155m states that a person, with some exceptions, can't hold himself out as a contractor without being registered with the department of commerce. Violators face forfeiture.</p>

State Legislation or Executive Order	Year Became Law	Description
<p>Wisconsin (cont.) <u>SB 672/AB 939 An act relating to compliance by employers with laws depending upon the proper classification of persons as employees</u></p> <p><u>Act 287/ AB 884 An act amending the unemployment compensation code</u></p>	<p>2010</p> <p>2010</p>	<p>The Department of Workforce Development is to educate construction employers on proper classification of workers as employees. The department is to refer complaints of improper classification of workers to other agencies and also cooperate with investigations by other agencies. The department is authorized to issue stop work orders to employers who fail to meet record keeping requirements or comply with the workers' compensation or unemployment compensation codes. The department is given additional investigatory powers.</p> <p>The Act creates a stricter definition of workers excluded from workers' compensation coverage in all industries by requiring the workers to be free from direction and control under contract and in fact, and by also requiring that 6 of 9 other conditions apply.</p>

Index

Budget items for enforcement

Iowa HA 1785 (2009); Minnesota HF 2088 (2009)

Certification required to be an independent contractor

Minnesota Chapt.135 § 15 (2007); Montana for workers compensation §39-71-419.

Conspirators, other than direct employer, specifically punished:

Florida §440.105; Delaware HB 230 (2009); Maryland SB 909 (2009); Pennsylvania HB 400 (2010).

Databases to be used to identify violators

All of the task forces are studying or requiring information sharing by agencies. Some, though, get technical and specifically require use or creation of databases. See Utah SB 189 (2008). Also, see California SB 869 (2007) which requires comparing companies registered with unemployment tax to those with workers' compensation coverage.

Disclosure of workers' compensation coverage

Maine LD 1456 (2009); New Hampshire HB 471 (2007) SB 78 (2009); Oklahoma SB 306 (2009); Vermont H 313 (2009); Washington HB 1555/SB 5614 (2009).

Employment definitions

See misclassification/failure to properly classify, and: Wisconsin Act 287/AB 884 (2010).

Employment status advisory opinion or determination

Colorado HB 1310 (2009); Maine LD 1815 (2010).

Information on violations of the law must be shared by state agencies

See, task forces, and misclassification/failure to properly classify, and: Indiana SB 478 (2009); Minnesota SF 1476 (2009); Ohio Secs..

5703.21 and 5747.18 (2009); Vermont H 313 (2009); Wisconsin SB 672/AB 939 (2010).

Misclassification as an independent contractor/failure to properly classify punished

Colorado HB1310(2009); Connecticut PA 7-89 (2007); Delaware HB 230(2009); Florida §440.107(7)(f); Illinois PA95-0026 (2007); Indiana SB 23 (2010), Kansas §44-766 (2006); Maryland SB 909 (2009), Massachusetts GL 149-§148B (2004); Minnesota Sec. 181.722 (2005); Missouri HB1549T (2008); Nebraska LB563 (2010); New Hampshire HB 1368 (2010); New Jersey C:34:20-1 et.seq. (2007); New Mexico SB657 (2005); New York S 5847F (2010); Pennsylvania HB 400 (2010); Vermont H 647 (2010); Wisconsin Act 28 (2009) and SB 672/AB 939 (2010).

Penalty revenue to enforcement

Again, there are many states that allow for penalty money to fund enforcement. This is a list of newer actions: Colorado HB 1366 (2007); Connecticut §31-69a (1994) also in PA 7-89 (2007); Delaware HB 230 (2009); Florida HB 561 §10 (2006); Illinois PA95-0026 (2007); New Hampshire SB 92 (2007); New Jersey A4009 (2007); Vermont H 647 (2010).

Penalties, in general

There are a variety of penalties, including criminal, civil, administrative, debarment, loss of licenses and stop work orders.

Presumptions of employment

Many states have presumptions of employment, especially in their unemployment codes, like Louisiana, Tennessee, Maryland and others. This is a list where the presumptions were either established or reaffirmed: Colorado HB 1310 (2009); Delaware HB 230 (2009); Illinois PA95-0026 (2007); Maine LD 1456 (2009); Maryland SB 909 (2009); Massachusetts §149-148B (2004); Minnesota Chapt. 135 §15 (2007); Montana for workers compensation if no independent contractor certification §39-71-419 (2005); New Hampshire HB 1368 (2010); New Jer-

sey A4009 (2007); New York S 5847F (2010).

Private cause of action allowed for effects of misclassification or non-reporting

There are many states that, for instance, allow employees to bring private suits to collect unpaid wages. Below are statutes that apply more directly to the effects of misclassification fraud. Here are samples of laws that allow employers to bring suit for unfair competition: Connecticut §52-570e (1990); Delaware HB 230 (2009); Florida §440-140 (1993). Here are statutes that allow employees to bring suit: Illinois PA95-0026 (2007); Maryland SB 909 (2009); Minnesota §181.722 (2005); New Jersey C:34:20-1 (2007).

“Shell” company use to violate the law is prohibited

Delaware HB 230 (2009); Maryland SB 909 (2009).

Stop work orders

California Labor Code §3710.1; Connecticut PA 7-89 (2007); Delaware 230 (2009); Florida §440-107; Maine LD 1565 (2010); Massachusetts GL 152§25C; New Jersey C:34:20-1 (2007), A 3569/S 2498 (2009); New York A 6163 (2007); Pennsylvania HB 400 (2010); Vermont H 647 (2010); Washington HB 1554/SB 5613; Wisconsin SB 6721/ AB 939 (2010).

Task Forces

(Citations with “study” mean the groups are charged with research and making recommendation. Citations without “study” refer to groups that perform enforcement and study work.)

California Unemp Ins Code §329 (1995); Connecticut PA 8-156 (2008); Hawaii (study) SB 2220 CD1 (2010); Iowa (study) EO 8 (2008); Maine EO 23FY08/09; Maryland EO 01.01.2009.09 (2009); Massachusetts EO 499 (2008); Michigan EO 2008-1 (2008); Minnesota SF 1476 (2009); Nevada (study) SCR 26 (2009); New Hampshire (study) SB 500 (2008); New Hampshire EO 2010-3 (2010); New Jersey EO 96 (2008); New York EO 17 (2007); Oregon HB 2815 (2009); Rhode Island (study) S 3099/H 7907B (2008); Tennessee (study) HB 3163/ SB

3591 (2010); Utah SB 189 (2008); Vermont S 345 (2008); Washington (study) SB 5926 (2007), (study) HB 1555/SB 5614 (2009); Vermont H 647 (2010). There are other states, like Louisiana, West Virginia and Wisconsin (study) that have assembled task forces without legislation or executive orders

Tax withholding from independent contractors in the construction industry

Minnesota Chapt. 154 HF 3201 (2008); New Jersey S 468 (2006).

“Universal” definitions of employment

(These laws apply a single definition of “employment” to more than one labor or tax code.)

New Hampshire SB 92 (2007); New Jersey C:34:20-1 (2007); Minnesota Chapt.135 § 15 (2007); New York S 5847F (2010); Pennsylvania HB 400 (2010); Washington HB 3122 (2008).

Workers’ compensation coverage required, with some exceptions, for independent contractors

There are numerous states that require employers to have workers compensation insurance for independent contractors/sole proprietors, but then apply exemptions. Listed here are more recently created laws: Colorado HB 1366 (2007); Delaware SS1 (2007); Florida §440-02(15) (c)(3) or S 50A (2003); Montana (if not a certified independent contractor) §39-71-419; New Hampshire (on public construction work) HB 471 (2007); Tennessee HB 1645 (2008) and HB 163/SB 3591 (2010).

Workers’ compensation coverage required for a license or building permit

Numerous states have these requirements. Recent examples include: Oregon HB 3242 (2007), Tennessee SB 1784 (2007).

Workers’ compensation premium fraud

Many states punish workers-compensation premium fraud specifically or as an insurance fraud. These are newer state laws addressing the problem: Louisiana HB 554 (2008); Nebraska LB 208 (2009); New

Hampshire SB 500 (2008); New Jersey A 3569/S 2498 (2009); South Carolina SB 332 (2007); Vermont S 345 (2008); H 313 (2009) H 647 (2010).

Workers' compensation, no coverage penalties

All states, except Texas, have laws that punish employers with civil or criminal penalties for not having coverage. Other than through stop work orders, here are states that have increased penalties: California SB 313 (2009); Connecticut PA 10-12 (2010); Louisiana HB 873 Act 288 (2010).

Appendix B

State Legislation: 2011 & 2012

2011

California

*AB 397 An act relating to workers' compensation and contractor licensing: The bill requires contractors who renew their licenses to file workers' compensation coverage or exemption certificates. Current law requires the documents for an initial filing for a license.

*SB 459 An act prohibiting the misclassification of employees as independent contractors: (1) This legislation applies to all industries. (2) Willful misclassification is prohibited as well as charging an individual a fee that would be a violation if the person was properly classified. (3) Enforcement comes from the labor department. (4) Penalties can be issued by the labor commissioner or a court: (a) \$5,000 to \$15,000 for each violation, (b) for a pattern or practice \$10,000 to \$25,000 per violation, (c) violators must display their violation on their web site. (4) There is a notice requirement for independent contractors. (5) Employer using independent contractors must keep records for two years. (6) Failure to provide notice or keep records results in a \$500 fine. (7) It is a misdemeanor to fail to provide or keep the required records or cooperate with an investigation. (8) A person who for pay knowingly advises on misclassifying employees is jointly and severally liable, except if the person who provides the advice to his employer or is an attorney providing the advice to a client. (9) The employment development department is to process requests for individuals seeking advice on their employment status. (10) Violators are also be reported to contractors' state licensing board for action by that agency.

*AB 878 An act regarding contractor licensing and disregard of workers' compensation requirements: (1) Insurers are required to report to the contractors' state license board if a policy has been cancelled after an audit or investigation and (a) a material misrepresentation was found, (b) the insurer suffered financial harm and (c) the insured has not been reimbursed. (2) Deliberate disregard and violation of workers compensation insurance laws is cause for disciplinary action by the license board.

Montana

*SB 287 An act regarding workers' compensation coverage for LLC managers: The bill would require managers of a limited liability company in the construction industry to have workers' compensation coverage or a valid exemption certificate.

*HB 110 An act regarding medical providers and ground for revoking an independent contractor exemption certificate: The bill provides that a certificate exempting an independent contractor from workers' compensation coverage can be revoked due to (a) misrepresentations made in the application or renewal of the certificate or (b) the certificate holder does not have an independently established business.

Nevada

Appendix B

*SB 58 An act regarding workers' compensation fraud penalties: This bill amends current workers' compensation fraud law by (1) making the knowing misclassification of an employee as an independent contractor a misdemeanor if it involves less than \$250 or a D felony if the amount involved is \$250 or more, (2) conspiracy to misclassify is also punished in the same way, (3) punishing the knowing misclassification of an employee's duties with a monetary penalty and as a gross misdemeanor.

Tennessee

*Public Chapter No. 436, HB 1378, Section 50-1-704 Establishing a misclassification penalty within e-verify legislation: (1)Section 50-1-704 prohibits misclassification to escape the e-verify, workers' compensation, unemployment insurance, wage payment or other requirements mandated by state employment law. (2) Information on violations is to be shared between the labor and insurance departments. (3) Violations result in penalties of between \$500 for a first occurrence and up to \$2,500 for a third occurrence. (4) All penalty money is deposited into an enforcement fund.

Utah

*SB 11 Worker classification coordinated enforcement: 1)This legislation amends a 2008 law creating an independent contractor data base and an enforcement task force. The bill creates a worker classification coordinated enforcement council. Members of the council are the labor commissioner or designee, the department of commerce, workforce services, tax commission and attorney general. (2) The purpose of the task force is to coordinate enforcement and regulatory efforts and to study the issue. (3) The task force must report on (a) how to reduce costs due to misclassification, (b) how to educate the public on classification requirements, (c) how to facilitate information sharing between agencies, (d) whether a data base is needed.

*SB 35 Construction licensees related amendments: 1)The following applies to payment of wages, workers' compensation coverage, antidiscrimination and occupational-safety protection: (a) A limited liability company that is required to be a licensed construction contractor is presumed to be the employer of its members. (b)The employment presumption can be overcome if a number of factors are proven, including that the member is not subject to supervision or control, is an active manager and owns an 8 percent or more ownership interest or is not subject to supervision or control. (2)Regarding construction licenses for LLC entities: (a) Applicants for a construction license must provide a list of members with an ownership interest. The list must be renewed every 90 days. (b)Members with an ownership interest can be required to prove their financial responsibility. (c) The division can conduct audits and require records, such as credit reports for all members with an ownership interest. (d) Licenses can be revoked for unprofessional or unlawful conduct. Such conduct includes (i) a person with an ownership interest in unlawfully present in the United States, and (ii) for members with less than an 8 percent ownership interest, there is a lack of workers' compensation and unemployment compensation coverage.

Appendix B

Virginia

*SJR 345 A joint resolution to study misclassification of employees as independent contractors:

The joint legislative audit and review commission is directed to study misclassification and report back. The commission is to study the status of misclassification in the state, the consequences, estimate the potential revenue lost to state and local governments and recommend strategies to alleviate any misclassification.

2012

Florida

*@SB 1586/HB 1277 An act relating to money service businesses: Existing statutes that regulate money service businesses are amended to: (1) prohibit the possession of instruments like signature and thumb-print stamps to falsify the identity of the person negotiating a check; (2) give the Office of Financial Regulation (OFR) the ability to make unannounced inspections; (3) require money service businesses to deposit checks into federally insured depository accounts; (4) require reporting of certain checks to OFR, and requiring information with the report such as the identity of the payee, the amount and the payee's workers' compensation policy number. Status: Signed by Gov. 4/12.

Louisiana

* SB 472 An act creating penalties for failure to properly classify workers as employees: (1) The bill applies to all industries and employers. It amends the state unemployment insurance code making the failure to properly classify a worker as an employee a violation of the law. (2) The first negligent violation results in a warning. Past due contributions and existing penalties are to be paid. Subsequent violations result in fines of up to \$250 and \$500 per individual. Also, there is a criminal penalty of \$100 to \$1,000, a prison term of 30 to 90 days, or both. (3) Administrative notice and hearings are available for an employer to challenge findings and penalties. (4) A willful violation results in all contributions and penalties due, and the state is required to debar the contractor from public construction for three years. (5) Employers are required to post a notice of obligations of independent contractors to pay taxes, the rights of employees to unemployment and workers' compensation benefits and the penalties an employer faces for failing to properly classify an individual. The notice also has complaint filing information.

Maine

*@LD 1314 An act to standardize the definition of independent contractor: (1) The bill applies to all industries. (2) There is penalty of \$2,000 to \$10,000 for knowingly misclassifying an employee as an independent contractor. Penalties under the state unemployment and workers compensation codes also apply. (3) The bill creates a uniform definition of employment in the unemployment and workers' compensation codes. It preserves a presumption of employment. Status: Signed by Gov.

Appendix B

Minnesota

*SF 1653/HF 2095 An act regarding registration of construction contractors: (1) The bill modifies existing regulation of independent contractors in the construction industry. (2) There is a presumption of employment in the construction industry, including LLC members, unless certain requirements are met to be an independent contractor. (3) To be an independent contractor a person must be registered and meet other conditions that demonstrate the person is in business. (4) A web site is created for contractor registration and that will also disclose cancellations of independent contractor certificates. (5) Prohibited acts result in monetary penalties and include: (a) being a construction business without being registered, (b) coercing or tricking a person into forming a business entity, (c) for a person in the construction industry, contracting construction work with a person that is not registered. (6) The bill repeals the requirement to withhold taxes from independent contractors in the construction industry. (7) A pilot program is created to make sure that the information requirement to be an independent contractor is adequate. (8) Information sharing between agencies is allowed.

North Carolina

*EO 125 Governor's Task Force on Misclassification: (1) The task force includes representatives from the industrial commission, revenue, public safety, commerce, employment security, insurance, labor, attorney general, controller and the legislature. (2) The group is charged with studying the problem, determining in which industries the practice is prevalent, educating stake holders, share information and solicit the assistance of law enforcement agencies and district attorney for referring appropriate cases for prosecutions.

Oklahoma

*HB 2258 An act requiring specified agencies to share information and coordinate investigations: (1) Contractors submitting bids on public projects must have employer state tax ID number. (a) Failure to comply results in a penalty up to 10 percent of bid. (2) Intentional misclassification as independent contractors results in a fine by state tax commission of up to 10 percent of bid. (3) The tax commission, workers' compensation commission, CompSource, department of labor and employment security division are required to share information and coordinate investigations to detect employers that intentionally misclassify workers as independent contractors. (4) The agencies are authorized to create a secure data base, interagency agreements and regulations for implementation.

Appendix C

Survey of National and State Studies

November 4, 2010

Employers “misclassify” workers to avoid withholding income taxes, paying employment taxes, overtime and workers compensation premiums. “Misclassification” or payroll fraud comes in two forms. First is the intentional reporting of employees as independent contractors to state and federal authorities or workers’ compensation carriers and issuing an IRS 1099 Misc. form at the close of the tax year. Second, there are employers who operate in the underground economy—they don’t bother to report all or a sizable portion of their workers. As will be seen, many studies of the problem do not quantify the degree or cost of the underground economy, which results in an underestimation of the true scope of the problem.

In the construction industry payroll fraud gives irresponsible employers a 30 percent or more advantage in labor costs. And in a competitive industry like construction that means responsible employers who play by the rules (and their employees) lose work. Fraud in construction is more common than in other industries, because of competitiveness, mobility of employers and the workforce, the temporary nature of the work and the multiple layers of contractors and subcontractors.

Below are brief descriptions of numerous national and state studies and other research of the size and cost of payroll fraud. Many are available at: www.PayrollFraud.net.

National Studies

***A 1984 study by the Internal Revenue Service** found that 19.8 percent of construction employers misclassified their employees.¹ The rate for all industries was 15%.² The total income, unemployment and Social Security tax loss was \$1.6 billion.³ Moreover, the IRS estimated that the loss of Social Security and unemployment taxes alone would be \$2.3 billion in 1987 and \$3.3 billion in 1992.⁴ A different estimate by the Government Accountability Office put the IRS’ 1984 number in 2006 dollars for a tax loss of \$2.72 billion.⁵

¹Described in *Tax Administration: Issues in Classifying Workers as Employees or Independent Contractors*, Statement of Natwar Gandhi, GAO/T-GGD-196-130, p. 13 (June 20, 1996).

² *Ibid*, p 1.

³ *Ibid*. pp. 4-5.

⁴ *Ibid*.

⁵ *Employment Arrangements: Improved Outreach could Help Ensure Proper Worker Classification*, GAO-06-565, p. 2 (July 2006).

***In 1994 Coopers & Lybrand** estimated that the federal government would lose \$3.3 billion in revenues in 1996 due to misclassification, and from 1996 to 2004 misclassification would cost the government \$34.7 billion.⁶

***A study released in 2000 for the US Department of Labor Employment and Training Administration by Planmantics, Inc.** found an unemployment tax loss of \$198 million annually due to misclassification of employees as independent contractors.⁷ Again, the construction industry was cited by sources as the most likely to offend.⁸

Unemployment tax audits in the following states found these percentages of employers with misclassified workers:⁹

California 29%, Connecticut 42%, Maryland 19.9%, Minnesota 13.4%, Nebraska 10%, New Jersey 9.15 %, Wisconsin 23% and Washington 10.3%.

***Many studies do not include the extent of unreported pay** in the underground economy.¹⁰ A **Bear Stearns 2005** report estimated that the United States is losing \$35 billion a year due to the number of jobs that are now “off the books.”¹¹

***The Government Accountability Office (GAO) issued a 2009 report on misclassification.**¹² The report begins with: “The national extent of employee misclassification is unknown; however, earlier and more recent, though not as comprehensive, studies suggest that it could be a significant problem with adverse

⁶ *Projection of the Loss in Federal Tax Revenues Due to Misclassification of Workers*, by Coopers & Lybrand, p. 3 (June 1994).

⁷ *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, by Planmantics, Inc., pp. iv, 69 and 93 (2000).

⁸ *Ibid.*, pp. 41-44.

⁹ *Ibid.*, pp. 57.

¹⁰ *The Social & Economic Cost of Employee Misclassification in Construction*, Construction Policy Research Center, Labor & Worklife Program, Harvard Law School & Harvard School of Public Health, by Bernhard and Herrick, p. 1 (December 2004) (Massachusetts Study), *The Social & Economic Cost of Employee Misclassification in the Maine Construction Industry*, Construction Policy Research Center, Labor & Worklife Program, Harvard Law School & Harvard School of Public Health, by Bernhard and Herrick, p. 1 (April 2005) (Maine Study), *Economic Costs of Employee Misclassification in the State of Illinois*, Dep. Of Economics, Univ. Missouri-Kansas City, by Kelsay, Sturgeon and Pinkham, p. 2 (December 2006) (Illinois Study) and *Misclassification of Employees as Independent Contractors*, Office of the Legislative Auditor, State of Minnesota, p. 15 (November 2007).

¹¹ *The Underground Labor Force is Rising to the Surface*, Bear Stearns Asset Management, by Justich and Ng, p. 3 (January 3, 2005).

¹² *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* GAO-09-717 (August 2009).

consequences.”¹³ The GAO had several recommendations to the executive branch to improve law enforcement including increasing referrals to other state and federal agencies and the formation of an interagency group including the IRS, DOL and other state and federal agencies to identify best practices and to improve efficiency of enforcement.¹⁴ The IRS and DOL agreed with the recommendations.¹⁵

A report on the unemployment tax and workers’ compensation premium losses shifted to law-abiding employers was done by Dr. Michael P. Kelsay of the Department of Economics at the University of Missouri-Kansas City. Using conservative estimates of misclassification, Dr. Kelsay found that \$831.4 million in unemployment taxes and \$2.54 billion in workers’ compensation premium losses are shifted annually to law-abiding employers.¹⁶

State Studies and Reports

*Interviews of over 300 construction workers in **Austin, TX in 2008 to 2009** found that 38 percent of them working on vertical construction projects were misclassified as independent contractors or paid unreported compensation, costing \$8.6 million in lost federal and unemployment taxes.¹⁷

*A **2007 study done for the California Commission on Health and Safety and Workers’ Compensation** disclosed that employers in all industries failed to report up to 23 percent of their payroll to workers’ compensation carriers, resulting in \$100 billion in underreporting.¹⁸ Because carriers shift costs to customers that do pay what they should, responsible employers who have workers in dangerous occupations are paying eight times more than they should be paying.¹⁹

¹³ *Ibid.*

¹⁴ *Ibid.*, pp. 41-42.

¹⁵ *Ibid.*, pp. 42-43.

¹⁶ *Cost Shifting of Unemployment Insurance Premiums and Workers’ Compensation Premiums*, by Michael P. Kelsay, pp. 5-6 (September 12, 2010).

¹⁷ *Building Austin, Building Injustice: Working Conditions in Austin’s Construction Industry*, by the Workers Defense Project, pp. 49-50 (2009).

¹⁸ *Up to One Fifth of California Payroll Not Reported*, WorkCompCentral, by Jim Sams (April 30, 2007). This study was of all employers, and not just construction. *Fraud in Workers’ Compensation Payroll Reporting: How Much Employer Fraud Exists and How are Honest Employers Impacted*: Report for the Commission on Health and Safety and Workers’ Compensation, by Frank Neuhauser and Colleen Donovan, University of California, Berkeley (August 2007).

¹⁹ *How Much Employer Fraud Exists*, pp. 1-3.

*A **2001 Florida study** reported that in 1997 \$912 million in workers compensation premiums were paid by construction industry employers, and that an additional \$1.3 billion was lost due to employer premium fraud and the state's exemption policies.²⁰ Reforms were enacted in 2003 to reduce costs and toughen enforcement.

*A **2008 Florida Grand Jury report on fraud and check cashing businesses** cited a fraud scheme by ten contractors that resulted in **\$1 billion of unreported cash** being paid to construction workers over three years.²¹ The report concluded its discussion on money laundering by check cashing businesses engaged in workers compensation premium fraud by writing:

In the short term, it may be prudent for the legislature to inquire of the [construction] industry, when considering this Grand Jury's recommendations, why they have apparently decided over the last few years to move increasingly to an all cash payroll.²²

***Illinois 2006:**²³

	All Industries	Construction
Degree employers who misclassify	17.8%	17.8% est
Unemployment taxes lost	\$ 53.7 million	\$ 2.5 million
State income taxes	248.4 million	17.3 million
Workers comp prem.	<u>97.9 million</u>	<u>34.8 million</u>
Total	\$400 million	\$54.6 million

This study does not include the degree of unreported pay in the underground economy.²⁴

The report further states that the **nationwide rate of misclassification** in all industries has not been static; it grew by 42 percent from 2001 to 2002.²⁵

²⁰ *A Study on the Magnitude of Loss of Workers' Compensation Premiums in 1997 due to Employer Fraud and Exemptions in the Florida Construction Industry*, by Construction Concepts, Coble Ph.D, Hinze Ph.D. P.E., pp. 27-28 (March 2001).

²¹ *Eighteenth Statewide Grand Jury Case No. SC 07-1128, Second Interim Report of the Statewide Grand Jury: Check Cashers: A Call for Enforcement*, p. 13. (West Palm Beach, Florida, March 2008).

²² *Ibid.* p. 14

²³ *Economic Costs of Employee Misclassification in the State of Illinois*, Dept. Of Economics, Univ. Missouri-Kansas City, by Kelsay, Sturgeon and Pinkham, pp. 4 to 8 and 15 (December 2006) (Illinois Study). The rate of misclassification in construction used here is the rate of misclassification for all industries. The Illinois study was unable to quantify exactly the construction rate, because the state did not provide industry specific audit data. It is fair to assume that construction rate is at a minimum the same as the overall rate, and that it is probably higher, because the Illinois data is based only on random audits, and the data from the other states shows a greater incidence of misclassification in construction.

²⁴ Illinois Study, p. 2.

²⁵ *Ibid.*, fn. 1, p. 2.

***Indiana 2010:**²⁶

From 2007-2008 the annual numbers are:²⁷

	All Industries	Construction
Degree employers who misclassify	47.5%	not quantified
Number of employers who misclassify	72,999	8,200
Number of employees misclassified	418,086	24,891
Unemployment taxes lost	\$ 36.7 million	\$ 2.2 million
State income taxes	245.8 million	17.7 million
Local income taxes	99.8 million	7.2 million
Workers comp prem.	<u>24.1 million</u>	<u>8.4 million</u>
Total of losses	\$406.4 million	\$35.5 million

Data for the study came from state unemployment-tax audits. The authors note that their study does not capture the underground economy, or workers paid in unreported-cash, thus their results may underestimate the true scope of the problem.²⁸

In 2008 research was done in Kentucky of people with work-place injuries seeking emergency treatment.²⁹ Twenty percent did not have workers compensation coverage, and 92 percent of them also did not have any health insurance.³⁰ Within that number of the uninsured, 54.2 percent were in the construction industry.³¹ The authors conclude:

Hiring practices that allow employers to avoid paying for both WC and health insurance have the effect of shifting the cost of injured workers' care to taxpayer-funded programs such as Medicaid's disproportionate share [sic] hospital funding.³²

²⁶ *The Economic Costs of Employee Misclassification in the State of Indiana*, Dept. of Economics, University of Missouri-Kansas City, by Sturgeon and Kelsay (2010).

²⁷ *Ibid.*, pp. 3-5.

²⁸ *Ibid.*, p. 3.

²⁹ *Disparities in Work-Related Injuries Associated With Worker Compensation Coverage Status*, Valerie, J. Nicholson, et. al. American Journal of Industrial Medicine (Author Proof document) (May 2008).

³⁰ *Ibid.*, pp. 2-3.

³¹ *Ibid.* p. 3.

³² *Ibid.* p. 4.

***Maine study 2005:**³³

	All Industries	Construction
Degree employers who misclassify	11%	14%
Unemployment taxes lost	not quantified	\$ 0.3 million
State income taxes	nq	4.3 million
Workers comp prem.	nq	6.5 million
FICA	nq	<u>10.3 million</u>
Total		\$21.4 million

This study does not include the degree of unreported pay in the underground economy.³⁴

***Maine Unemployment Audits 2004-2007:**³⁵

A review of Main Department of labor unemployment audits for all industries showed that 29% of employers misclassified employees as independent contractors in 2004, 39% in 2005, 43% in 2006 and 41% in 2007. Most of the misclassification in 2006 was by construction employers.

***Maryland study 2009:**

Written testimony from the Maryland Governor's Office puts the number of employers who fail to properly classify at 20 percent for all industries to as high as 25 percent in some industries.³⁶ The cost to the state is a \$22 million a year loss to the unemployment trust fund and \$81 million in unpaid state income taxes.

***Massachusetts study 2004:**³⁷

	All Industries	Construction
Degree employers who misclassify	up to 19%	up to 24%
Unemployment taxes lost	\$ 35 million	\$ 3.9 million
State income taxes	152 million	6.9 million

³³ *The Social & Economic Cost of Employee Misclassification in the Maine Construction Industry*, Construction Policy Research Center, Labor & Worklife Program, Harvard Law School & Harvard School of Public Health, by Bernhard and Herrick, pp. 1-2 (April 2005) (Maine Study)

³⁴ Maine Study, p. 1.

³⁵ Exec. Order No. 23 FY 08/09, Office of the Governor ME (January 14, 2009)

³⁶ Testimony of Carolyn Quattrocki, Deputy Legislative Officer, Thomas Perez, Secretary of labor, Licensing and Regulation, Vicki Schultz, Senior Advisor for Consumer Protection, Labor Licensing and Regulation on House Bill 819, Workplace Fraud Act of 200; House Economic Matters Committee, p. 2, (March 3, 2009).

³⁷ *The Social & Economic Cost of Employee Misclassification in Construction*, Construction Policy Research Center, Labor & Worklife Program, Harvard Law School & Harvard School of Public Health, by Bernhard and Herrick, p. 1 (December 2004) (Massachusetts Study).

Workers comp prem.	91 million	7 million
Total	\$278 million	\$17.8 million

This study does not include the degree of unreported pay in the underground economy.³⁸

***Michigan 2008 study:**³⁹

30 percent of employers underreport their employee payroll by misclassifying employees as self employed or underreporting payroll. 8 percent of Michigan employees are misclassified as self-employed or receive undeclared income from their employers, resulting in \$1.5 billion in unreported payroll to state unemployment insurance annually.⁴⁰ 26 percent of construction employers misclassify employees or pay unreported payroll, 24% of trucking employers and 56% of security-guard firms.⁴¹ **Construction employers, though, were much more likely to engage in payroll fraud** rather than routine misclassification as an independent contractor.⁴²

	All Industries ⁴³	Construction ⁴⁴
Degree employers who misclassify	30%	26%
Unemployment taxes lost	\$ 17 million	\$2.5 million
State income taxes	\$20-33 million	\$2.2-3.7 million
Social Security	\$34-57 million	nq
Fed. Income Tax	\$58-96 million	nq
Total	\$129-203 million	

***Minnesota 2007 study:**⁴⁵

	All Industries	Construction
Degree of employers who misclassify	14%	15%

³⁸ Massachusetts Study, p. 1.

³⁹ *The Social and Economic Costs of Employee Misclassification in the Michigan Construction Industry*, Dale L. Belman and Richard Block, School of Labor and Industrial Relations, Michigan State University (2008) (Michigan Study).

⁴⁰ Michigan Study, p. 5.

⁴¹ *Ibid.*, p. 7

⁴² Of those who run afoul of the law, 38% misclassified and 62% didn't report payroll at all. *Ibid.*, p. 9.

⁴³ *Ibid.*, p. 5 and 10.

⁴⁴ *Ibid.*, p. 9-10.

⁴⁵ *Misclassification of Employees as Independent Contractors*, Office of the Legislative Auditor, State of Minnesota, pp 15 and 18 (November 2007).

Within construction, the study found that 31% of drywall employers misclassify their employees as independent contractors.⁴⁶

This study does not include the degree of unreported pay in the underground economy.⁴⁷

***New Jersey 2007**

In testimony before Congress, New Jersey's Labor & Workforce Development Commissioner David J. Socolow reported that a sample audit of 2.2% of employers uncovered **42%, in all industries, misclassifying employees as independent contractors** or paying them cash "off the books."⁴⁸ Those 2006 audits found 25,000 misclassified workers and **\$565 million in unreported wages.**

***New York state study 2007:**⁴⁹

	All Industries	Construction
Degree employees misclassified	10.3%	14.8%
Unemployment taxes lost	\$176 million	nq

*A sense of **the size of unreported-cash pay in the underground economy** can be found in the **Fiscal Policy Institute's study of the residential construction market in New York City.** They compared residential building permits and FW Dodge construction activity data to construction employment from 2000 to 2005.⁵⁰ Conservatively, New York City had 82,000 residential construction workers in 2005. 30,000 of those construction workers were employed illegally.⁵¹ (13,000 may have been misclassified and the other 17,000 were completely off the books.⁵²) That means that a minimum of 21 percent of New York City residential construction workers received unreported pay. The numbers were worse in the city-funded affordable-housing construction market, where up to two thirds of the 13,350 construction workers were employed illegally.⁵³

⁴⁶ *Ibid.*, p. 20.

⁴⁷ Minnesota Study, p. 15.

⁴⁸ *Congressional Probe Look sat Misclassified Workers*, by Michael Whiteley, [Workcompcentral](#) (August 1, 2007).

⁴⁹ *The Cost of Worker Misclassification in New York State*, Cornell Univ., ILR School, by Donahue, p. 2 (February 2007) (New York Study).

⁵⁰ *The Underground Economy in the New York City Affordable Housing Construction Industry*, Fiscal Policy Institute (New York City Housing), p. 1, 9. (April 2007).

⁵¹ New York City Housing, pp. 1, 10-12.

⁵² *Ibid.*

⁵³ *Ibid.*, pp. 1, 8-9.

***The Fiscal Policy Institute also released a study in December 2007 on illegal employment practices in the entire New York City construction market.⁵⁴** Like the study of the residential market, this study captures workers who are improperly misclassified as well as those paid unreported compensation.⁵⁵ The study made the following findings of losses in 2005:⁵⁶

Total number of construction workers:	200,000
Number misclassified or paid off the books:	50,000
Health care cost shifting:	\$148 million
Fed income tax lost:	43.5
Fed employment tax/comp. premium lost:	271.6
New York state income tax lost:	15.2
New York City income tax lost:	<u>11.0</u>
Total cost:	\$489.3 million

FPI further estimates that fraud in New York City will cost the \$557 million in 2008.

***Ohio 2009 study:**

The Ohio Attorney General's office did a study on the size and cost of misclassification based on 2005 unemployment-tax audits and findings in other state studies.⁵⁷

Number of misclassified employees:	459,000 ⁵⁸
State Unemployment taxes lost:	\$100 million
Workers comp. premiums	\$510 million
State income taxes	\$180 million
<u>Local income taxes</u>	<u>\$100 million</u>
Total annual loss	\$890 million

In addition, they estimated that the lost federal Social Security and Medicare taxes are \$500 to 600 million and federal income taxes are \$500 million.⁵⁹

⁵⁴ *Building Up New York, Tearing Down Job Quality: Taxpayer Impact of Worsening Employment Practices in New York City's Construction Industry*, Fiscal Policy Institute (New York City Construction) (December 2007).

⁵⁵ New York City Construction, p. 1.

⁵⁶ *Ibid.*, pp. 1, 20-21.

⁵⁷ *Report of the Ohio Attorney General on the Economic Impact of Misclassified Workers for State and Local Governments in Ohio* (February 18, 2009)

⁵⁸ *Ibid.*, p. 19.

⁵⁹ *Ibid.*, p. 22.

***Pennsylvania 2008 study**

9 percent, 580,000, workers are misclassified as independent subcontractors annually, costing the unemployment compensation trust fund over \$200 million a year in lost revenue.⁶⁰ The cost to the worker's compensation system is \$81 million in lost premiums.⁶¹

This study does not include the degree of unreported pay in the underground economy.⁶²

***Tennessee 2010 study**

Researchers found that up to 38,680 construction workers, 21 percent of the construction workforce, were misclassified as independent contractors or paid unreported compensation in 2006.⁶³ The losses were \$14 million to the state unemployment trust fund in 2006, \$91.6 million in workers' compensation premiums and \$115.4 million in federal income and employment taxes.⁶⁴

***Vermont 2007 study**

The Vermont Department of Labor, assisted by the Department of Banking, Insurance, Securities & Health Administration studied (1) the feasibility of having an on-line proof of coverage database through the National Council of Compensation Insurance (2) the extent and nature of class code and independent contractor misclassification and (3) the effectiveness of current Vermont law to counter misclassification.⁶⁵ Most of the answers came from a survey of the top 9 workers' compensation insurers in the state.⁶⁶ They concluded that it is feasible to have an on-line proof-of-coverage open to the public.⁶⁷

⁶⁰ Testimony of Patrick T. Beaty, Deputy Secretary for Unemployment Compensation Programs, Pennsylvania Department of Labor and Industry, before the House of Representatives Commonwealth of Pennsylvania, Labor Relations Committee on HB 2400, The Employee Misclassification Prevention Act, p. 3 (April 23, 2008) (hereinafter *Beaty*).

⁶¹ Testimony of Timothy L. Wisecarver and Bruce Decker, Pennsylvania Compensation Rating Bureau, Summary of Testimony before the House of Representatives Commonwealth of Pennsylvania, Labor Relations Committee on HB 2400, The Employee Misclassification Prevention Act, p. 3 (April 23, 2008).

⁶² *Beaty*, p. 3.

⁶³ *Misclassified Construction Employees in Tennessee*, Dr. William Canak and Dr. Randal Adams, pp. iv and vi (January 15, 2010).

⁶⁴ *Ibid.*, p. v.

⁶⁵ *Vermont Department of Labor Study Required by Act 57 (S 196) 2007 Legislative Session: The Misclassification of Workers in Vermont's Workers' Compensation System*, p. 3 (December 2007).

⁶⁶ *Ibid.* p. 21.

⁶⁷ *Ibid.* at p. 3.

Also, they found that insurance companies don't believe that class-code misclassification is a serious problem.⁶⁸ They do believe that independent contractor misclassification is a problem and that it is a particular problem in the construction industry.⁶⁹ The insurers say that misclassification of class codes and especially employees as independent contractors raises premium costs.⁷⁰ Regarding current statutes, the Department of Labor recommends a uniform definition of independent contractor for its unemployment and workers compensation codes.⁷¹

***Washington 2007 study:**⁷²

In-state and out-of-state business registered with the IRS but not with Washington in 2004 cost the state \$274 million in unpaid taxes (that includes taxes for workers compensation coverage). Unpaid taxes for Washington employers are \$101.3 million. Industry breakdowns for these employers are available.

In 2001, and additional \$183 million of unpaid taxes can be added for business that are neither registered with the IRS and Washington. Industry breakdowns for these employers are not available.

Breakdown in millions:

	In&Out of State All Industries	In-State All Ind.	In-State Construction
State income tax	225.0	52.0	1.0
State unemplmnt	14.8	14.8	3.4
workers comp.	34.5	34.5	8.7
Total	\$274.3	\$101.3	\$13.1

The study cites construction as an area where the number is probably higher, because they don't have an industry breakdown of the employers who aren't registered (don't pay taxes) to either the federal and state. Construction is cited as a focus for enforcement.

⁶⁸ *Ibid.* at pp. 3 and 15.

⁶⁹ *Ibid.* at pp. 4 and 15-16

⁷⁰ *Ibid.* at. p. 15.

⁷¹ *Ibid* at pp. 4-5 and 9-10

⁷² *Unregistered Business Study: Joint Report of the Washington State Dept. of Revenue, Washington State Dept. of Labor and Industries and the Washington State Employment Security Dept.*, pp. 2, 3-7, 11-17 and 19 (November 2007).

A report released by the Wisconsin Misclassification Task Force disclosed that 44% of workers of companies audited by unemployment tax were reclassified as employees.⁷³

⁷³*Report of the Worker Misclassification Task Force Submitted to Secretary Roberta Gassman, Department of Workforce Development*, pp. 6-7 (2009).

Appendix D: Enforcement Procedures - States and Insurance Carriers

What Other States Have Done:

34 states have adopted pro-law enforcement measures to tackle payroll fraud and increase state revenues. They include: adopting stop work orders, forming enforcement task forces and increasing fines and other penalties. In the region:

- FL: They have stop work orders, administrative fines for workers' compensation premium avoidance, an enforcement task force, funding for special prosecutors and penalties for money service businesses that conspire with the cheaters.
- KY: Their law allows administrative penalties for workers' compensation premium avoidance.
- LA: They have penalties for intentional failure to classify workers as employees and an enforcement task force. Also, they have installed fraud detection IT system that is paying for itself in additional unemployment insurance assessments.
- OK: They have penalties against construction employers for failure to classify workers as employees and they have formed an enforcement task force.
- NC: A 2012 executive order established an enforcement task force.
- VA: A 2012 study by their legislative commission has recommended that they adopt stop work orders.

National Conference of Insurance Legislators (NCOIL)

NCOIL has recognized the high degree of premium avoidance by construction employers. In 2009 they adopted model enforcement legislation for the construction industry based largely upon Florida law. The model contains administrative penalties for premium avoidance and stop work orders.

Appendix E: State Task Forces & Outcomes

Taskforces:

States that have formed task forces by legislation, executive orders (EO) or administrative action:
(2012 in bold)

(Citations with “study” mean the groups are charged with research and making recommendation. Citations without “study” refer to groups that perform enforcement and study work.)

California Unemp Ins Code §329 (1995); Connecticut PA 8-156 (2008); Hawaii (study) SB 2220 CD1 (2010); Iowa (study) EO 8 (2008); Maine EO 23FY08/09 (rescinded 2011); Maryland EO 01.01.2009.09 (2009); Massachusetts EO 499 (2008); Michigan EO 2008-1 (2008); Minnesota SF 1476 (2009); Nevada (study) SCR 26 (2009); New Hampshire (study) SB 500 (2008); New Hampshire EO 2010-3 (2010); New Jersey EO 96 (2008); New York EO 17 (2007); **North Carolina EO 125 (2012)**; **Oklahoma HB 2258 (2012)**; Oregon HB 2815 (2009); Rhode Island (study) S 3099/H 7907B (2008); Tennessee (study) HB 3163/ SB 3591 (2010); Utah SB 189 (2008) and SB 11 (2011); Vermont S 345 (2008); Washington (study) SB 5926 (2007), (study) HB 1555/SB 5614 (2009); Vermont H 647 (2010). There are other states, like Florida, Louisiana, West Virginia and Wisconsin (study) that have assembled task forces by administrative action. Iowa is a state that formed a misclassification task force unit for enforcement work. In Tennessee, agencies forming the advisory task force have begun cooperative enforcement work by administrative action as allowed by law.

Sample Taskforce outcomes:

Iowa:

2011 report: Their task force covers all industries. From July 2009 to through December 2011 it found that 307 employers had misclassified 3,522 workers, failing to report \$75.6 million in wages. Unemployment insurance contributions due were \$2.8 million along with \$980,000 in penalties and interest. Construction employers were the most non-compliant: 158 construction employers misclassified 2015 employees, failing to report \$49.5 million in wages. \$2.5 million in contributions were found due along with \$918,000 in penalties and interest.

New York:

From September 2007 through December 2010, the task force uncovered 50,000 misclassified workers, \$704 million of unreported wages and \$42 million in unpaid wages, unemployment insurance contributions and unemployment contribution and workers compensation penalties. In 2011, the task force found \$19,600 misclassified workers, \$412 million of unreported wages. They also found \$14.5 million in unpaid wages, unemployment insurance contributions and unemployment contribution and workers compensation penalties.

See case profiles for task force outcomes for Florida and Louisiana.

Stop work orders:

States that have adopted stop work orders:

Appendix E: State Task Forces & Outcomes

California Labor Code §3710.1; Connecticut PA 7-89 (2007); Delaware 230 (2009); Florida §440-107, improved in 2003 by SB 50A; Maine LD 1565 (2010); Massachusetts GL 152§25C; New Jersey C:34:20-1 (2007), A 3569/S 2498 (2009); New York A 6163 (2007); Pennsylvania HB 400 (2010); Vermont H 647 (2010); Washington HB 1554/SB 5613 (2009); Wisconsin SB 6721/ AB 939 (2010).

Sample Case Profiles

Florida

State:

Operation Dirty Money (2012)

Information available at:

<http://www.myfloridacfo.com/sitePages/newsroom/pressRelease.aspx?id=4090>

<http://www.myfloridacfo.com/sitePages/newsroom/pressRelease.aspx?id=4114>

<http://www.myfloridacfo.com/sitePages/newsroom/pressRelease.aspx?id=4096>

Operation Dirty Money is a task force investigation of fraudulent transactions in the construction industry. The task force includes the Florida Department of Financial Services (the state department that investigates workers' compensation fraud) and the Broward County Sheriff's office. They are assisted by the state Attorney General's office, the Office of Financial Regulation and the Broward County and Dade County state's attorney's offices.

Numerous defendants have been charged with violations of money services business laws, conspiracy to commit workers' compensation fraud and grand theft. The defendants have been alleged to have used shell companies and check cashing stores to hide their true payrolls as part of a scheme that allowed construction employers to avoid workers' compensation premiums. So far, twelve shell companies have been shut down and over a \$140 million in fraudulent transactions have been identified.

In their press releases, state officials believe that these fraudulent transactions divert \$1 billion annually from the Florida economy.

Florida v. Salameh, et. al. Case No: 06-002395CF10 (2007)

The defendants were charged with racketeering, conspiracy to commit racketeering, workers' compensation fraud, grand theft, uttering a forged instrument, money laundering and structuring transactions. The co-defendants used shell companies to run more than \$15 million through a check cashing store to avoid paying workers' compensation premiums. Dozens of construction companies used the shell companies.

Appendix E: State Task Forces & Outcomes

Defendants plead guilty and were sentenced to a variety of prison terms, including a 33 months in jail for one defendant.

Federal:

US v. Guevara, Case No. 1:07-CR-20043-ASG-3 (SDFL 2007)

Information available at:

<http://www.carpenters.org/misclassification/ALL%20DOCUMENTS/Broward%20cnty%20tax%20preparer%20sentenced%20for%20part%20in%20fraud-USAttySDFla%202-07-08.pdf>

Enrique Guevara was an accountant in south Florida. He and others were engaged in a conspiracy to underreport the true payroll of Sandi Construction, so Sandi could lower its workers' compensation premiums. Sandi provided workers to other construction contractors. Guevara filed false tax returns while the other conspirators, two insurance brokers, improperly attained workers' compensation coverage at the lower, improper premiums. Only 6 workers were declared on payrolls, while the insurance brokers provided workers' compensation certificates purportedly covering hundreds of workers Sandi supplied workers to well over a hundred contractors in twelve Florida counties. Through the scheme, Sandi evaded some \$4 million in workers' compensation premiums.

Guevara pleaded guilty to tax fraud, conspiracy and aiding the filing of false tax returns. He was sentenced to 13 months in prison. One insurance broker was also sentenced and another is a fugitive.

US v. Caro, Maytemar Corp., d/b/a "La Bamba Check Cashing, Case No. 08-2004-CR-Lenard/Garber(s) (SDFL 2008)

Information available at:

<http://www.usdoj.gov/usao/fls/PressReleases/090209-02.html> and
<http://www.usdoj.gov/usao/fls/PressReleases/090623-04.html>

Construction companies used shell corporations provided through LaBamba check cashing in order to complete transactions in anonymity. Through the course of the conspiracy, \$132 million of transactions were processed by LaBamba through false currency transaction reports. Following a trial, Caro, the owner of LaBamba, was found guilty of one count of conspiracy and 15 counts of failing to file currency transaction reports. He was sentenced to 216 months in prison and \$11 million in forfeiture.

In a February 2, 2009 press release, US Attorney Alex Acosta stated, "Again and again, we see how those with resources try to make use of shell companies and other fraudulent schemes to avoid their financial obligations."

Louisiana

Louisiana v. Aguirre, Case No. 2010-CR-13490 (2010)

Appendix E: State Task Forces & Outcomes

Information available at:

Attorney General's Office Accepts Guilty Plea in Lafayette Businessman Fraud Case, Press Release, James D. "Buddy" Caldwell, Attorney General (May 4, 2011)

This case resulted from a task force investigation by the Louisiana Attorney General's office, the Workforce Commission and the state police.

Mauro Aguirre and his wife Keren operated a company called Escapade Acoustic Drywall. They were arrested in 2009 after an investigation disclosed that they were reported 35 employees and a payroll of \$145,000 when they should have reported over 300 employees and a payroll of \$4.2 million. Mauro Aguirre pled guilty and received a two year suspended sentence and three years of probation. He also agreed to pay restitution to the state in the amount of \$200,000. \$100,000 was for the Louisiana Workforce Commission, \$95,000 for the Department of Revenue and \$5,000 for the Department of Justice.

In a related investigation, the US Department of Labor Wage & Hour collected over \$203,000 in overtime back wages for 224 drywall installers who had been misclassified as independent contractors. Escapade was a subcontractor for Lloyd N. Moreau LLC. The DOL investigation concluded that Moreau and Escapade were joint employers, and both companies agreed to pay the back overtime wages and to cease from misclassifying their employees. Information about the USDOL case can be found at: <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southwest/20110607.xml>.

Oregon

Oregon v. Vega, Case No. 08C51095 (2008)

Information available at:

<http://www.doj.state.or.us/releases/2009/re1011309.shtml>

Defendant Maurillio Castillo Vega operated a number of construction companies. Vega and two companies were indicted on 16 counts of racketeering. He along with other contractors and check cashing stores, were alleged to have been engaged in a criminal enterprise from 2001 to 2008. Vega set up sham companies to avoid taxes and workers' compensation premiums. The scheme allowed Vega to pay his workforce in unreported cash. As a result state income taxes were not paid on \$25 million of payroll. Lost state taxes were estimated at \$8 million.

Vega was convicted and sentenced to 61 months in prison.

Tennessee

Tennessee v. Nobles (2010)

Information available at:

Appendix E: State Task Forces & Outcomes

<http://www.scdag.com/Information/NewsReleases/tabid/75/mid/383/newsid383/244/Grand-Jury-Indicts-Memphis-Business-Owner-for-Workers-Comp-Fraud/Default.aspx>

Richard “Mike” Nobles operated numerous construction businesses that also supplied labor to larger construction firms in Tennessee and other states. Nobles was indicted on four counts of workers’ compensation premium fraud for under-reporting payroll to the following carriers: Travelers Insurance, Berkley Regional Insurance, Work First Casualty and Ulico Casualty. The counts were for violations of over \$60,000 carrying a maximum class B felony penalty of 12 years imprisonment per count. Nobles was apprehended with the help of TBI agents and Shelby County Sheriff deputies with a packed suitcase as he was preparing to leave town. At the time of his arrest, the total amount of unpaid premiums was estimated at \$1 million. The case was prosecuted by Assistant District Attorneys William Bright, Brooks Irvine and Byron Winsett.

Nobles pleaded guilty in November 2012 to all four counts. He was sentenced to 9 years suspended, 10 years probation and weekends in jail for a year. Also, according to prosecutor Byron Winsett, Nobles is to pay \$1.2 million in restitution to insurance carriers.